

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**FRED RANDO**

Claimant

VS.

**KANEB PIPELINE COMPANY**

Respondent

AND

**RELIANCE INSURANCE COMPANY**

Insurance Carrier

Docket No. 166.343

## ORDER

**ON** the 21st day of December, 1993, the application of respondent for review by the Appeals Board of an Award by Special Administrative Law Judge Kenton D. Wirth dated October 11, 1993, came on for oral argument by telephone conference. Because Kenton D. Wirth now sits as a member of the Appeals Board, a member pro tem, Jeff K. Cooper, of Topeka, Kansas, was appointed pursuant to K.S.A. 44-555b(i) for purposes of this case and therefore Mr. Wirth did not participate in the decision by the Appeals Board.

## APPEARANCES

The claimant appeared by and through his attorney, Michael L. Snider, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

## RECORD

The record considered by the Appeals Board is the same as that listed in the Award of the Special Administrative Law Judge dated October 11, 1993.

## STIPULATIONS

The Appeals Board hereby adopts those stipulations listed in the Award of Special Administrative Law Judge dated October 11, 1993.

## ISSUES

After stipulations were taken, the following issues remained in dispute for decision

by the Administrative Law Judge:

- (1) Whether claimant met with personal injury by accident on the alleged dates of injury from October 27, 1991 through the last date worked, June 17, 1992.
- (2) Whether claimant's alleged accidental injuries arose out of and in the course of his employment.
- (3) What is the nature and extent of claimant's disability, if any?
- (4) Whether respondent is entitled to credit, pursuant to K.S.A. 44-510a, and if so, the amount of any credit.
- (5) Whether notice was properly given and, if not, whether respondent was prejudiced thereby.
- (6) Whether claimant is entitled to \$350.00 for unauthorized medical expense.

On appeal respondent's argument focused on whether claimant met with personal injury on the dates alleged.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1,2,3) For injury occurring from October 27, 1991 through June 17, 1992 claimant is entitled to an award for fifty percent (50%) permanent partial general disability.

Claimant injured his low back while loading conduit on November 27, 1991. Claimant had previously injured his low back in December of 1987. The injury of October 27, 1991 was to generally the same area of claimant's low back. Claimant continued to work for respondent from October 27, 1991 through June 17, 1992. In May of 1992 Dr. Fleming, the physician to whom respondent had referred claimant, imposed additional restrictions to claimant's work. Upon notice of those restrictions, respondent advised claimant that that he could not continue to do the work and terminated claimant's service effective June 17, 1992.

Respondent argues the evidence does not support claimant's allegation that he suffered additional injury on October 27, 1991 and continuing thereafter until June 17, 1992. The only expert testimony on this issue is that of Dr. Schlachter, who does state that, in his opinion, claimant did suffer additional injury. He testified that on a functional basis claimant had five percent (5%) impairment from the injury of 1987 and an additional five percent (5%) from the injury alleged in this claim. He noted that the MRI done on November 2, 1991 after the second injury, showed broad base bulges at two levels. The prior MRI had shown a bulge only at one level. He also noted increased symptomatology following October 27, 1991. Dr. Schlachter recommends claimant limit his lifting to single lifts of 50 pounds and repetitive lifts of not over 40 pounds.

Mr. Jerry Hardin testified, based upon the restrictions recommended by the treating physician, Dr. Fleming, that claimant's ability to perform work in the open labor market has been reduced by 45 to 50 percent (45-50%). He also states that, in his opinion, claimant's ability to earn a comparable wage has been reduced by 66 percent (66%). The wage loss comparison is arrived at by using \$730.08 as a pre-injury wage and \$280.00 a week as approximate post-injury wage. The Appeals Board notes that claimant's prior injury

resulted in a settlement based upon functional impairment only. No work restrictions had been imposed prior to those recommended by Dr. Fleming as a result of the injury involved in this claim.

The Appeals Board must weigh and consider both loss of access to the open labor market and loss of ability to earn a comparable wage. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) and Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). From the evidence presented the Appeals Board finds it reasonable to conclude, as did the Administrative Law Judge, that upon weighing of these two factors, claimant has experienced a 50 percent (50%) permanent partial general disability.

(4) The Appeals Board finds that respondent should be allowed a 100 percent (100%) credit under K.S.A. 44-510a for the period that permanent partial disability benefits payable for the accidental injury occurring on October 27, 1991 overlapped with the permanent partial disability benefits in this proceeding.

Pursuant to K.S.A. 44-510a, a respondent is entitled to a credit for payments being made pursuant for a previous injury where that previous injury causes or contributes to a subsequent injury. In this case, Dr. Schlachter, the only physician testifying on this point, indicated that the injury of October 27, 1991 through June 17, 1992 probably or most likely would not have occurred but for a preexisting impairment from previous injury which occurred December, 1987 through October 26, 1991. For credit to be calculated, the overlap period is June 17, 1993 through October 1, 1999 and the contribution is 100 percent (100%). The weekly rate on the prior award is \$19.20 per week and that amount is to be deducted from the payments made in this case during the period of overlap.

(5) The Appeals Board finds that respondent had adequate notice of the ongoing symptomatology of claimant and notice has been satisfied. The Appeals Board further finds there is no evidence of prejudice in this case.

(6) Claimant is entitled to unauthorized medical expense up to the statutory maximum of \$350.00 upon proper presentation of the amount of the charge for Dr. Schlachter's examination.

### **AWARD**

**WHEREFORE**, an award of compensation is hereby made affirming the decision of the Special Administrative Law Judge of October 11, 1993 in awarding benefits in favor of claimant, Fred Rando, and against the respondent, Kanab Pipeline Company, and its insurance carrier, Reliance Insurance Company, for an accidental injury sustained on June 17, 1992.

The claimant is awarded a fifty percent (50%) permanent partial general disability, less a credit pursuant to K.S.A. 44-510a. The weekly compensation rate prior to calculating the credit is \$211.30 per week, and for those weeks which credit is appropriate, the weekly compensation rate is \$192.02 per week. As of February 22, 1994, 88 weeks of compensation at \$192.02 per week, in the sum of \$16,897.76 is due and owing and should be paid immediately, less any amounts previously paid. Thereafter the claimant is to receive 293.71 weeks of compensation at the rate of \$192.02 per week, and subsequently, claimant is to receive 33.29 weeks of compensation at the rate of \$211.30 per week making a total award in this case of \$80,330.13.

Further award is made that claimant is entitled to unauthorized medical up to the statutory limit of \$350.00.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed the respondent to be paid directly as follows:

IRELAND COURT REPORTING	
Transcript of Regular Hearing	\$ 128.00
Transcript of Continuation of Regular Hearing by Deposition	\$ 247.86
TOTAL	\$ 375.86
ALEXANDER REPORTING COMPANY	
Deposition of Jerry D. Hardin, M.S.	\$ 206.20
Deposition of Ernest R. Schlachter, M.D.	\$ 196.00
Deposition of Mack Brown	\$ 267.20
Deposition of Leanne Lechner	\$ 350.40
Deposition of Darcy Williams	\$ 74.00
TOTAL	\$1093.80

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 1994.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

cc: Edward D. Heath, Jr., P.O. Box 95, Wichita, Kansas 67201-0095  
Michael L. Snider, 2628 South Oliver, Suite 104, Wichita, Kansas 67210  
Kenton D. Wirth, Special Administrative Law Judge  
George Gomez, Director